

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Petition for Declaratory Ruling To Clarify)	WC Docket No. 11-118
47 U.S.C. § 572 in the Context of Transactions)	
Between Competitive Local Exchange Carriers)	
And Cable Operators)	
)	
Conditional Petition for Forbearance from)	
Section 652 of the Communications Act for)	
Transactions between Competitive Local)	
Exchange Carriers and Cable Operators)	
)	

COMMENTS OF COMCAST CORPORATION

On June 21, 2011, the National Cable and Telecommunications Association (“NCTA”) filed a petition for a declaratory ruling, and, in the alternative, a petition for forbearance, to facilitate the Commission’s process for reviewing acquisitions of competitive local exchange carriers (“LECs”) by cable operators.¹ Comcast Corporation (“Comcast”) fully supports NCTA’s petitions. As explained below, allowing cable operators to acquire overlapping competitive LECs would comport with the text and legislative history of section 652 of the Communications Act of 1934, as amended (“Communications Act”); foster competition between cable operators and incumbent LECs; and avoid the cumbersome and anti-competitive waiver process that otherwise would apply. The Commission therefore should grant the relief sought by NCTA in an expeditious fashion by declaring that section 652(b) permits a cable operator to

¹ Petition for Declaratory Ruling of the National Cable & Telecommunications Association, WC Docket No. 11-118 (June 21, 2011) (“Petition”); Conditional Petition for Forbearance of the National Cable & Telecommunications Association, WC Docket No. 11-118 (June 21, 2011) (“Conditional Petition”); *see also Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act*, Public Notice, DA 11-1177 (rel. July 8, 2011).

acquire a competitive LEC within its franchise area or, barring that, forbearing from requirements in section 652 to the extent requested by NCTA.

I. NCTA’S PETITIONS ARE CONSISTENT WITH THE TEXT AND LEGISLATIVE HISTORY OF SECTION 652

As NCTA explains, the text and legislative history of section 652 indicate that Congress intended to restrict only cable-incumbent LEC and incumbent LEC-cable transactions, not the acquisition of competitive LECs by cable operators.² Section 652(a), which covers circumstances in which a LEC is acquiring a cable operator, plainly applies only when there is a LEC-cable overlap within the LEC’s “telephone service area.”³ Section 652(e) defines a “telephone service area” as the area where the LEC provided telephone exchange service as of January 1, 1993 – a time when very few competitive LECs even existed.⁴ Thus, if a LEC did not offer telephone exchange service as of January 1, 1993 and therefore had no telephone service area on that date, it is not subject to the LEC-cable buy-out prohibition in section 652(a).

The FCC should apply a symmetrical interpretation to section 652(b)’s prohibition against a cable operator’s acquisition of a LEC in its franchise area. While section 652(b) refers to the area in which a LEC is “providing telephone exchange service,” the most plausible interpretation of that phrase is that it refers to the geographic area in which a LEC provides “telephone service.” Under this interpretation, section 652(b) prohibits a buyout only if the target LEC’s telephone service area (*i.e.*, the area in which it provides “telephone exchange service”) overlaps the cable operator’s franchise area. It is reasonable to conclude that Congress

² Petition at 5-11; *see also id.* at 11-13 (explaining that the FCC has previously indicated that section 652(b) is limited to transactions involving incumbent LECs).

³ 47 U.S.C. § 572(a).

⁴ 47 U.S.C. § 572(e). This “post-1992” exemption also is incorporated in section 652(c), which prohibits certain joint ventures between a LEC and cable operator with overlapping service areas. *See* 47 U.S.C. § 572(c).

intended for the FCC, in making this overlap determination, to use the same definition of a LEC's "telephone service area" that applies to transactions covered by section 652(a).⁵ Under this symmetrical reading of subsections (a) and (b), a LEC that commenced service after January 1, 1993 could lawfully acquire cable systems in its territory, while a cable operator similarly could acquire an overlapping LEC that commenced service after January 1, 1993.

A symmetrical interpretation not only is consistent with the text of section 652, but also is likely what Congress intended when it passed section 652. Like other provisions added by the Telecommunications Act of 1996 ("1996 Act"), section 652 embraces Congress's goal of encouraging competition, in this case between the operators of the two "lines" or "wires" to the consumer: incumbent LECs, which own the telephone lines, and cable operators, which own the cable lines.⁶ The floor debates in Congress concerning section 652 thus emphasized the importance of maintaining separate ownership of the "two lines coming in [to the consumer premises] – a telephone line and a cable line."⁷ As the Commission has stated, "Congress' main

⁵ See 47 U.S.C. § 572(e) (defining "telephone service area" for the "purposes of this section," *i.e.*, all of section 652). As NCTA explains, at a minimum, section 652(b) is ambiguous, affording the FCC discretion to interpret it in a reasonable manner consistent with its text and legislative history. Petition at 9. By contrast, insisting on an allegedly literal reading of section 652(b), which would bar cable buyouts of overlapping competitive LECs that commenced service after January 1, 1993, would result in a bizarre statutory construction that, at a minimum, is highly suspect under judicial precedent. As the U.S. Supreme Court has stated, "[w]here the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989) (citation and internal quotation marks omitted). Here, it would be "odd" for Congress to permit a LEC that began offering service after January 1, 1993 to acquire an overlapping cable operator under section 652(a), but to prohibit the same combination of cable and competitive LEC assets under section 652(b). Given this "odd result," the FCC must rely on other evidence of congressional intent, which, as explained below, requires that the Commission find that the scope of the section 652(a) and 652(b) prohibition is identical.

⁶ Petition at 2.

⁷ See Statement of Sen. Kerrey, 141 Cong. Rec. S8134, 8137 (June 12, 1995); *see also* Statement of Sen. Kerrey, 141 Cong. Rec. S7881, 7911 (June 7, 1995).

concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a local cable operator and thus control *both wires* to consumers.”⁸ Given the dearth of facilities-based competitive LECs then in existence,⁹ “both wires,” of course, means the incumbent LEC wire and the cable wire to the consumer.

For these reasons, the Commission should interpret section 652(b) as barring only a cable operator from acquiring an incumbent LEC within its franchise area. A cable operator’s acquisition of a competitive LEC within the same area will remain subject to FCC review under the FCC’s section 214 authorization transfer process, but these transactions should not be subject to section 652’s restrictions.

II. AS THE CIMCO TRANSACTION DEMONSTRATES, ALLOWING CABLE OPERATORS TO ACQUIRE COMPETITIVE LECs WILL PROMOTE, RATHER THAN HINDER, COMPETITION BETWEEN CABLE OPERATORS AND INCUMBENT LECs

As explained above, interpreting section 652(b) to permit cable operators to acquire competitive LECs is most consistent with the text and the legislative history of section 652. This reading also will best advance the pro-competitive policies of the 1996 Act by promoting the “two-wire” competition that Congress sought when it enacted section 652. As NCTA explained in its petitions, many competitive LECs need additional capital to compete with incumbent LECs

⁸ *Applications of Ameritech Corp. and SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 564 n.1081 (1999) (emphasis added).

⁹ Before 1993, most of the few competitive LECs then operating leased the incumbent LEC’s wire to the premises, or resold the incumbent LEC’s service, rather than deploying their own last-mile facilities. This remains the case even today. See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2010*, at 10 (March 2011) (of the 22 million competitive LEC retail switched access lines reported in June 2010, 71 percent were provided through resale of incumbent LEC wholesale or retail service or through leasing of incumbent LEC facilities as unbundled network elements, while the remaining 29 percent of lines were provided over local loops owned by the competitive LECs).

in today's marketplace.¹⁰ Cable companies similarly can benefit from competitive LECs' infrastructure and expertise and thereby compete more effectively with incumbent LECs in the provision of telecommunications services, especially for business and enterprise customers, a segment currently dominated by the regional Bell Operating Companies ("BOCs").¹¹ Thus, a cable operator's acquisition of a competitive LEC in its franchise area can materially advance the pro-competitive, pro-consumer objectives of the 1996 Act.

Comcast's recent acquisition of the assets of CIMCO Communications, Inc. ("CIMCO"), a Chicago-based competitive LEC, illustrates the benefits of cable-competitive LEC transactions.¹² When the FCC approved the CIMCO acquisition in March 2010, it identified three public interest benefits. First, the transaction likely would "increase the level of competition in the medium-sized and enterprise business marketplace in Comcast's service territories," "allowing Comcast to benefit from the experience, expertise and capabilities of CIMCO's sales force and key managers."¹³ Second, the transaction likely would "provide benefits for CIMCO's current customers located in buildings that can be served by Comcast's existing plant," particularly Comcast's Metro-Ethernet-based services and other high-capacity

¹⁰ See Conditional Petition at 9 (observing that "many [CLECs] do not have the financial resources to compete effectively," and that "CLEC-cable combinations . . . may offer the best hope for cash-strapped CLECs").

¹¹ Petition at 2; Conditional Petition at 7-12.

¹² CIMCO's existence post-dates January 1, 1993.

¹³ *Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 3401, ¶ 38 (2010) ("CIMCO Order").

data products.¹⁴ Finally, the transaction would “advance facilities-based competition, which is likely to result in consumer benefits.”¹⁵

Today, the BOCs (AT&T and Verizon) have by far the largest share of the marketplace for voice, data, and Internet access services to medium-sized and enterprise business customers in the Chicago metropolitan area and elsewhere. Verizon, for example, touts its leadership in the enterprise and mid-sized business marketplace, claiming that it “serves 96 percent of the Fortune 1000 customers, as well as businesses with 20 or more lines.”¹⁶ Likewise, in the Commission’s recent *Business Broadband Proceeding*, Verizon emphasized the importance of Ethernet services for business customers, and conceded that “Verizon and AT&T are often each other’s largest competitor for these types of larger enterprise services.”¹⁷

Given the limited role of cable operators and competitive LECs in providing facilities-based competition for medium-sized and enterprise customers, and the pro-competitive benefits of allowing cable operators to acquire competitive LECs in their franchise territories (as identified in the CIMCO order), the public interest would best be served by interpreting section 652(b) in way that facilitates such transactions – without the burden of seeking a waiver. Further, such an approach would be the most consistent with the text and legislative history of section 652 and advance the pro-competitive policies of the 1996 Act.

¹⁴ *Id.* ¶ 39.

¹⁵ *Id.* ¶ 40.

¹⁶ Verizon Fact Sheet (May 2011), *available at*: <http://newscenter.verizon.com/kit/vcorp/factsheet.html#Enterprise-Mid-Market_Business>.

¹⁷ Comments of Verizon and Verizon Wireless, WC Docket No. 10-188, at 25 (Oct. 15, 2010).

III. CONTINUING TO SUBJECT CABLE-COMPETITIVE LEC TRANSACTIONS TO SECTION 652'S WAIVER PROCESS WOULD HARM COMPETITION AND WASTE FCC RESOURCES

If the Commission does not grant either of NCTA's petitions, cable operators will need to seek waivers to gain approval of their acquisition of competitive LECs within their franchise areas, pursuant to section 652(d)(6). In the CIMCO proceeding, the Commission established a process for granting waivers under section 652(d)(6), which requires that local franchising authorities ("LFAs") in areas covered by the transaction approve of such waivers. Under this process, the applicants were required to serve the public notice of the transaction on all affected LFAs, and the LFAs were given 60 days to express approval or disapproval of the waiver request with the Commission. If an LFA failed to inform the Commission of its decision within this 60-day period, it was deemed to have approved of the waiver request.¹⁸

Although this process proved workable in the CIMCO transaction, one LFA (the City of Detroit) expressed "disapproval" of the waiver request on grounds having very little, if anything, to do with the CIMCO transaction itself, thereby preventing the Commission from granting the parties a waiver in that franchise area. The process established in the CIMCO proceeding does not require an objecting LFA to provide reasons for disapproving a waiver request. An LFA consequently may elect to block the approval of a pro-competitive cable acquisition of a competitive LEC for reasons wholly unrelated to the transaction itself. Such a result undermines the pro-competitive benefits of competitive LEC-cable transactions.

The Commission can and should avoid the time-consuming and resource-intensive waiver process when a proposed cable operator's acquisition of a LEC does not implicate any of the competitive concerns that led Congress to adopt section 652. Specifically, the Commission

¹⁸ CIMCO Order ¶ 15.

should either interpret section 652(b) in the symmetrical manner outlined above, as set forth in NCTA's Petition for Declaratory Ruling or, alternatively, forbear from enforcing section 652(b) to the extent requested in NCTA's Petition for Forbearance.

IV. CONCLUSION

For the foregoing reasons, the Commission should declare that section 652(b) of the Communications Act permits a cable operator to acquire a competitive LEC. If the Commission declines to issue such a ruling, it should forbear from requirements in section 652 to the extent requested by NCTA. Comcast respectfully urges the FCC to grant this relief expeditiously.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 22nd day of August, 2011, I caused true and correct copies of the foregoing Comments of Comcast Corporation to be served by electronic mail to:

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